J Heng Consulting Services (M) Sdn Bhd & Anor v The New Straits Times Press (M) Bhd

HIGH COURT (PULAU PINANG) — CIVIL SUIT NO 22-435 OF 2001
KAMALANATHAN RATNAM J
23 APRIL 2003

Tort *— Damages — Aggravated damages — Whether the court should award aggravated damages — Present trend of award — Interest*

Tort *— Defamation — Freedom of speech — Duty of press in reporting court proceedings — Restriction imposed by law — Whether there is special privilege accorded to the press — Whether defendant recklessly and maliciously defamed the first plaintiff*

The first plaintiff is engaged in providing professional secretarial services and advice to clients and has been so engaged for 20 years and has acquired a good reputation and is believed to have a good clientele from the Chinese business community. The second plaintiff, an accountant and a chartered secretary, was at all material times the managing director and the alter ego of the first plaintiff. The defendant is the foremost leading English daily in Malaysia with a very wide circulation. The defendant published a news article that one Tan Phaik Tin ('Tan'), a company director from the first plaintiff was charged with four counts of forgery by using false resolutions. It was the case of the plaintiffs that at no time did they ever engage the services of, nor did they employ the said Tan. The plaintiffs brought an action against the defendant and contended that they suffered humiliation and felt defamed by the publication. The defendant entered appearance and filed an elaborate defence. Subsequently, the defendant and the plaintiffs recorded a consent judgment. Damages was awarded at RM200,000 but no aggravated or exemplary damages was awarded. Both parties were dissatisfied with that decision and appealed to the High Court.

Held, dismissing the defendant's appeal:

(1) Whilst the defendant has a duty to report on court proceedings, it must only report what is actually said in court. A distinction must be drawn between the right to 'freedom of speech' and the 'freedom of the press'. Whilst the courts would endeavor to see that the right to freedom of speech is protected, there is no special privilege accorded to the press. It must conform and be liable for its publication just like any ordinary citizen if it transgresses the law relating to libel (see p 488E, H).

(2) Neither the defendant nor its solicitors made a search at the Registry of Companies ('the ROC') to ascertain if Tan was a director of the first plaintiff. A search at the ROC would most certainly have shown that the first plaintiff had indeed been wronged; and at that very stage when the demand notice was

received, the defendant could have, as requested in the demand letter, admitted liability and mitigated damages (see pp 487H–488A). A

(3) The adamant stand of the defendant with its ill-advised course of defence must lead the court to conclude that the defendant was reckless in its publication and was not concerned whether such an allegation was true or false. The defendant paid no heed to its publication and recklessly and maliciously defamed the first plaintiff (see p 489B–C). B

(4) The court declined to make an award of aggravated or exemplary damages because of the present trend to minimize the awards. The court found that the plaintiff had already been given a sufficiently reasonable award under general damages. The court, however, made the award of interest at 4% to run from the date of publication of the article to the date of assessment (see pp 489H–I, 490B); *Karpal Singh a/l Ram Singh v DP Vijandran* [2003] 2 MLJ 385 followed. C D

[Bahasa Malaysia summary

Plaintif pertama berniaga dengan memberikan perkhidmatan kesetiausahaan dan nasihat kepada pelanggan-pelanggan dan telah melakukan perkhidmatan tersebut selama 20 tahun dan mendapat nama baik serta dipercayai mempunyai hubungan yang baik dengan masyarakat peniaga China sebagai pelanggannya. Plaintif kedua, seorang akauntan dan setiausaha berkanun, adalah pada setiap masa matan pengarah urusan dan alter ego kepada plaintif pertama. Defendan adalah akhbar harian utama berbahasa Inggeris di Malaysia dengan sebaran yang luas. Defendan telah menerbitkan berita tentang Tan Phaik Tin ('Tan'), seorang pengarah syarikat daripada plaintif pertama yang dituduh dengan empat pertuduhan pemalsuan melalui penggunaan resolusi-resolusi yang palsu. Plaintif-plaintif telah mengatakan bahawa mereka tidak pernah sesekalipun menggunakan khidmat atau menggaji Tan sebagai pekerja mereka. Plaintif-plaintif telah memulakan satu tindakan terhadap defendan dan menegaskan bahawa mereka telah dimalukan dan difitnah oleh penerbitan tersebut. Defendan telah memasuki kehadiran dan memfailkan satu pembelaan yang panjang lebar. Berikutan itu, defendan dan plaintif-plaintif telah merekodkan satu penghakiman persetujuan. Ganti rugi telah diawardkan sebanyak RM200,000 tetapi tiada ganti rugi teruk atau teladan telah diawardkan. Kedua-dua pihak berasa tidak puas hati dengan keputusan tersebut dan telah merayu kepada Mahkamah Tinggi. E F G H

Diputuskan, menolak rayuan defendan: I

(1) Meskipun defendan mempunyai kewajipan untuk membuat laporan tentang prosiding mahkamah, ia hanya perlu melaporkan

apa yang sebenarnya dikatakan dalam mahkamah. Satu perbezaan harus dinyatakan antara 'kebebasan bersuara' dan 'kebebasan akhbar'. Walaupun mahkamah-mahkamah akan berusaha untuk memastikan bahawa hak kebebasan bersuara dilindungi, tiada apa-apa keistimewaan khas diberikan kepada akhbar. Ia harus akur dan bertanggungjawab terhadap penerbitannya seperti mana-mana warganegara biasa sekiranya ia melanggar undang-undang berkaitan (lihat ms 488E, H).

(2) Defendan maupun peguamcaranya tidak membuat carian di Pendaftar Syarikat ('PS') untuk memastikan jika Tan adalah pengarah plaintif pertama. Satu carian di PS sudah pasti menunjukkan bahawa plaintif pertama memang telah teraniaya; dan pada peringkat tersebut di mana notis tuntutan diterima,. defendan sepatutnya seperti yang dikehendaki dalam notis tuntutan tersebut, mengaku bertanggungjawab dan meminta ganti rugi diringankan (lihat ms 487H–488A).

(3) Pendirian tetap defendan untuk meneruskan dengan pembelaannya yang tidak bijak membawa mahkamah kepada kesimpulan bahawa defendan telah bersikap melulu dalam penerbitannya dan tidak peduli sama ada suatu pengataan itu benar atau palsu. Defendan tidak peduli tentang penerbitannya dan secara melulu dan dengan niat jahat telah memfitnah plaintif pertama (lihat ms 489B–C).

(4) Mahkamah enggan untuk membuat satu award untuk ganti rugi teruk atau teladan kerana amalan sekarang yang mengurangkan jumlah award. Mahkamah mendapati plaintif telahpun diberikan satu award yang munasabah dan mencukupi di bawah ganti rugi am. Mahkamah, bagaimanapun, telah membuat award untuk faedah 4% bermula dari tarikh penerbitan artikel tersebut hingga tarikh penilaian (lihat ms 489H–I, 490B); *Karpal Singh a/l Ram Singh v DP Vijandran* [2003] 2 MLJ 385 diikut.]

Notes

For cases on aggravated damages, see 12 *Mallal's Digest* (4th Ed, 2000 Reissue) para 116.

For cases on freedom of speech, see 12 *Mallal's Digest* (4th Ed, 2000 Reissue) para 248.

Cases referred to

Arnold v King Emperor (1914) 83 LJ PC 299 (refd)

Karpal Singh a/l Ram Singh v DP Vijandran [2003] 2 MLJ 385 (folld)

Langlands v Leng (1916) SC (HL) 102 (refd)

Normala Samsudin v Keluarga Communications Sdn Bhd [1999] 2 MLJ 654 (refd)

Noor Asiah bte Mahmood & Anor v Randhir Singh & Ors [2000] 2 MLJ 175 (refd) A

John Khoo (*Ismail, Khoo & Assoc*) for the plaintiffs.
Harminder Kaur Gill (*Shearn Delamore & Co*) for the defendant.

Kamalanathan Ratnam J: B

Facts

The first plaintiff was and is engaged in providing professional secretarial services and advice to clients and has been so engaged for 20 years and had acquired a good reputation and is believed to have a good clientele from the Chinese business community. The second plaintiff, an accountant and a chartered secretary was at all material times the managing director and the alter ego of the first plaintiff. The defendant is the foremost leading English daily in Malaysia with a very wide circulation. C

On 17 July 2001, the defendant published daily the following news: D

> Director charged with four counts of forgery
> A company director claimed trial at the sessions court today to four counts of forgery by using false resolutions three years ago. Tan Phaik Tin, 41, from J Heng Consulting Services (M) Sdn Bhd was charged with fraudulently using a false Directors Circular Resolution Driall (Malaysia) Sdn Bhd dated 5 November 1998, as an original document while knowing it to be forged between 5 November 1998 and 13 November 1998. For the second and third charge, she was alleged to have committed a similar offence between 1 June 1998 and 2 June 1998 and between 3 June 1998 and 31 July 1998. For the fourth charge, Tan was alleged to have fraudulently used a false Members Circular Resolution as an original document, while knowing it to be forged, between 3 June 1998 and 31 July 1998. Tan was alleged to have committed all four offences at the company's premises at Jalan Cantonment here. She was charged under section 471/468 of the Penal Code, punishable with maximum imprisonment of seven years and a fine. E F

It was the case of the plaintiffs that at no time did they ever engage the services of, nor did they employ, the said Tan Phaik Tin ('Tan'). By an order to amend dated 4 February 2002, the plaintiffs also averred that the said Tan was never the director at any time nor did she hold any position in the first plaintiff. G

By publishing the said news, the plaintiffs contended that the defendant through its reporter and editorial staff, had meant that:

(a) the plaintiffs or their staff had been engaged in criminal activities; H

(b) the plaintiffs could not be believed and that they have indulged in forgery, fraud or cheating;

(c) the plaintiffs were not professional and were not providing proper services to the general public;

(d) one of the plaintiffs' employees has been charged by the public prosecutor and that it is believed that the plaintiffs would be responsible; I

(e) the plaintiffs were dishonest, untrustworthy, were clever at manipulating, were unscrupulous, imprudent, shrewd and cunning and had conspired to cheat and had abetted in illegal activities;

(f) the plaintiffs could not be relied on to do an honest job they as were involved in a scandal;

(g) the plaintiffs were not suited to be involved in such a service industry;

(h) the plaintiffs ought to be shunned by the general public as being criminals, cheats and thus lacking in credibility; and

(i) the plaintiffs have no integrity or morals to be able to perform secretarial services and to render advice.

The plaintiffs further pleaded that as soon as the said publication had appeared in the defendant's newspapers, the plaintiffs received numerous calls from their clients enquiring as to the implications arising out of the publication. The plaintiffs contended that they suffered humiliation and felt defamed.

The plaintiffs forthwith demanded an apology through their solicitor's letter dated 20 July 2001 and sought damages but the defendant failed to respond. Contending that the defendant had falsely and maliciously published the article, the plaintiffs thus sued for libel and prayed for:

(i) general damages amounting to RM2m or such sum as the court finds just and reasonable;

(ii) damages;

(iii) an injunction to restrain the defendant and its servants or agent, from circulating the said or such similar article or in any other way from defaming the plaintiffs;

(iv) exemplary damages;

(v) aggravated damages;

(vi) costs; and

(vii) such other or further relief that the court finds suitable.

The defendant entered appearance and filed an elaborate defence. Other than admitting the said publication, the defendant denied any of the allegations, implications and innuendoes relied on by the plaintiffs. The defendant further contended that subject to the defendant seeking discovery of documents and interrogatories from the plaintiffs, it intended to justify its publication by pleading particulars relating to corruption. The defendant contended that:

(a) corruption is a serious set-back towards the rise of the Malaysian economy and its position when compared to other nations of the world;

(b) corrupt practices by a director, employee of a firm or an accounting firm, weakens the public's trust towards such a professional body;

(c) it is important that the public be kept informed regarding directors, employees of firms and accounting firms who are being investigated,

charged, brought to court or those who are suspected of being involved in corrupt practices; and

(d) it is obligatory on its part to keep the general public informed regarding directors, employees of firms and accounting firms who are being investigated, charged brought to court, or those who are suspected of being involved in corrupt practices.

Another important pleading of the defendant was that it had taken reasonable and careful steps to ensure the correctness of the facts before publication. The defendant pleaded that its reporter had spoken to one Harpal Singh, the accused Tan's counsel, in court on the hearing date and that the said Harpal Singh had indeed confirmed that Tan was a director of the first plaintiff.

The defendant further pleaded that if that was not true, certainly it would not have published the said article. The defendant pleaded that it intended to take out third party proceedings against the legal firm of Harpal & Co. The defendant admitted that it had received the plaintiffs' solicitor's notice of demand but pleaded that it neither tendered an apology or agreed to pay damages. The defendant denied any liability.

The defendant promptly filed an ex parte summons (encl 10) for leave to issue third party proceeding against Harpal Singh, which application was set for hearing on 11 March 2002. The plaintiffs' application to amend the statement of claim was resisted by the defendant. However, the learned deputy registrar granted the order to amend on 4 February 2002. Dissatisfied with that decision, the defendant appealed (encl 12). In the meantime, the plaintiffs took out an application (encl 7) to strike out the defence and to fix a date for assessment of damages and also asked for costs. Enclosures 7 and 10 were fixed for hearing on 19 June 2002.

The defendant then filed a notice of change of solicitors. On 19 June 2002, the defendant's new solicitors and the plaintiffs' solicitors appeared before me and recorded consent judgment in respect of encl 7 as follows:

(1) the plaintiff to withdraw encl 7;

(2) the defendant admits that the publication of the said article constituted a libel against the first plaintiff;

(3) the second plaintiff withdraws from the suit with no order as to costs; and

(4) damages to be assessed by the court with costs to follow the event.

The learned senior assistant registrar ('SAR') then proceeded to assess damages and on 22 January 2003, she made an order as follows:

(i) damages RM200,000;

(ii) no aggravated or exemplary damages; and

(iii) costs to be agreed upon or to be taxed.

Both parties were dissatisfied with that decision. The first plaintiff appealed (encl 25) against the learned SAR's refusal to award:

A (i) exemplary and aggravated damages;

(ii) interests on the damages awarded;

(iii) costs for the entire suit and not just costs for the assessment of damages only.

B The defendant appealed (encl 26) against the award of RM200,000.

Findings of the court

I heard both the appeals on 19 March 2003 and by consent, I heard encl 26 first.

C Enclosure 26

In a short submission, counsel for the daily urged the court to award a sum of RM30,000 which she had submitted as fair damages before the learned SAR. She argued that the defamatory sting arose out of the use of the word 'from' in the publication since the inclusion of the word 'from' gave the D impression that Tan was a director of the first plaintiff when read together with the title.

Mr John Khoo for the first plaintiff informed the court that the defendant only entered into the consent order after the plaintiffs had filed encl 7 to strike out the defence. Whilst pointing out that the first plaintiff E was not appealing against the award of RM200,000, he urged the court not to disturb the said sum. Although not found anywhere in the pleadings, parties by consent agreed that Tan was found guilty of all four counts and that she has since appealed against conviction and sentence.

There are numerous reasons why I felt compelled not to disturb the F award of the learned SAR. Although there is no compulsion for the learned SAR to give her reasons, she must have been guided by set principles in exercising her discretion in making the said award.

The first plaintiff in its statement of claim had stated what it was engaged in and that it was mainly rendering, secretarial services and advice to Chinese businessman. The defendant runs a daily which has an extensive G circulation.

Whilst I agree that if not for the word 'from J Heng Consulting Services (M) Sdn Bhd' in reference to Tan, there would have been no cause of action against the defendant, words once spoken or written must be construed in the context the man in the street would receive its meaning. Here, the use H of the preposition 'from' clearly indicates that the guilty person Tan was a director of the first plaintiff.

Whilst the first plaintiff's case was that the said Tan had no dealings with it, either as an employee or as a director, even when the notice of demand was sent out at the behest of the first plaintiff to the defendant through the first plaintiff's solicitors, neither the defendant nor its solicitors I made a search at the Registry of Companies ('the ROC') to ascertain if the said Tan was a director of the first plaintiff. A search at the ROC would most certainly have shown that the first plaintiff had indeed been wronged;

and at that very stage when the demand notice was received, the defendant could have as requested in the demand letter, admitted liability and mitigated damages.

Instead of this, the defendant took a stand and which if it was right, it most certainly was entitled to do. The defendant pleaded in its defence that one Harpal Singh, an advocate and solicitor who defended the said Tan had told the defendant's reporter that the said Tan was a director of the first plaintiff. As I said earlier, if that was true then there was a valid defence. However, since after the said notice of demand, the plaintiffs pursued with the cause of action by filing this suit, surely the defendant ought to have, as an act of prudence, at that stage made a search at the ROC.

The defendant filed an elaborate defence and pleaded that it intended to seek discovery of documents and interrogatories. The defendant further sought to justify its publication by pleading that it owed a duty to the public to keep the public informed of investigations, or charges being preferred against directors, employees of firms and employees of professional bodies since corrupt practices by such persons would have a detrimental effect on the country's economy.

Whilst I agree that the slippery tentacles of corruption have laid their grip on the affairs of man, yet the conduct of the defendant in trying to seek protection by exposing corruption, and by alleging that the accused Tan was from the first plaintiff, meant that the said Tan, a director of the first plaintiff was corrupt and ought to be exposed and in so doing, the affairs of the first plaintiff ought also to come under public scrutiny. Indeed, the defendant maintained that it was obligatory on its part to keep the public informed. As I said, whilst the defendant has a duty to report on court proceedings, it must only report what is actually said in court. In *Langlands v Leng* (1916) SC (HL) 102, Lord Shaw said at p 110 as follows:

> A newspaper has the right, and no greater or higher right to make comment upon a public officer or person occupying a public situation than an ordinary citizen would have.

In *Arnold v King Emperor* (1914) 83 LJ PC 299, Lord Shaw again said at p 300 as follows:

> To whatever lengths the subject in general also may go, so also may the journalist, but apart from statute law, his privilege *is* no other and no higher ... the range of his assertions, his criticisms, or his comments, is as wide as, and no wider than, that of every other subject. No privilege attaches to his position.

A distinction must be drawn between the right to 'freedom of speech' and the 'freedom of the press'. Whilst the courts would endeavour to see that the right to freedom of speech is protected, there is no special privilege according (accorded?) to the press. It must conform and be liable for its publication just like any ordinary citizen if it transgresses the law relating to libel.

I say this because the defendant was so convinced of the correctness of its conduct that it even admitted in the defence that if not for the fact that

Harpal Singh had told its reporter that Tan was a director of the first plaintiff, it would not have published such a statement. On this account, the defendant took out third party proceedings against Harpal Singh. I would have thought that even at this stage the defendant could have written to Harpal Singh for confirmation as to whether he did indeed make such a statement and that if he denied the same, to admit liability and to mitigate damages. The adamant stand of the defendant in proceeding with its ill-advised course of defence must lead this court to conclude that the defendant was reckless in its publication and was not concerned whether such an allegation was true or false. Having filed the third party proceedings, the defendant made no further progress towards justifying such a course of action. On the contrary, it made an about turn and conceded liability. This to my mind, clearly meant that the defendant paid no heed to its publication and recklessly and maliciously defamed the first plaintiff.

Every newspaper has an obligation not only to its readers but also to the person, the subject of its comments. Reputation once tarnished will lose its lustre. If one steps into a muddy pond even with the intent of picking a sweet-smelling water lily; the smell of the mud will linger for a long time however much one scrubs the mud off one's feet. Reputation is just like that. That is why accurate and unbiased reporting is a pre-requisite for a national newspaper. It is no use berating overseas reporting and news disseminators of unfair and incorrect reporting. The newspapers in this country must set an example.

Another factor this court had to consider is the refusal of the defendant to apologize. That would have been an important mitigating factor. Having considered all these factors, I had no hesitation in dismissing the defendant's appeal with costs.

Enclosure 25

Although the plaintiff has not appealed against my decision, however for completeness, I hereby give my reasons in respect of the plaintiff's appeal:

(i) The first complaint of the plaintiff was that there was no award for exemplary and aggravated damages. In *Normala Samsudin v Keluarga Communications Sdn Bhd* [1999] 2 MLJ 654, I awarded aggravated damages because the defendant had further aggravated the defamation by repeating the libel in publications subsequent to the improper publication, despite a complaint by the plaintiff. Whilst in *Noor Asiah bte Mahmood & Anor v Randhir Singh & Ors* [2000] 2 MLJ 175, I had made an award for aggravated damages in almost a similar situation where no offer of an apology had been made, and considering the reckless manner in which the articles were written, yet I had declined to make an award under this head in this case because of the present trend to minimize the awards. I found that the plaintiff has already been given a sufficiently reasonable award under general damages.

(ii) I allowed the first plaintiff's appeal under this head since the learned SAR made no award for interest on the general damages. In the latest decision of the Federal Court, namely in *Karpal Singh a/l Ram Singh v DP Vijandran* [2003] 2 MLJ 385, the Federal Court held that it is unfair to deprive the plaintiff of interest for the period in which the plaintiff has been deprived of its money, as interest ought to be awarded to the extent that is fair and proper. I was the trial judge in that case and the Federal Court had held that the award of 4% interest on the damages awarded from the date of publication to the date of judgment was reasonable. I therefore made the same award of interest at 4% to run from the date of publication of the article to the date of assessment.

(iii) on this score where the learned SAR only awarded the first plaintiff costs of the assessment and not the full costs of the trial, learned counsel for the daily very honorably left the matter to the court. I therefore allowed the appeal on this and granted the first plaintiff costs for the full trial inclusive of the cost of the assessment of damages. I also allowed the first plaintiff's costs of this appeal.

Defendant's appeal dismissed.

Reported by Peter Ling